

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID A. CORTEZ,

Defendant and Appellant.

D048425

(Super. Ct. No. SCS193230)

APPEAL from a judgment of the Superior Court of San Diego County, Alvin E. Green, Judge. Affirmed as modified.

A jury convicted David A. Cortez of forcible rape (Pen. Code, § 261, subd. (a)(2))¹ and forcible oral copulation (§ 288a, subd. (c)(2)). He contends the trial court (1)

¹ All statutory references are to the Penal Code.

abused its discretion by denying his *Marsden*² motion, and (2) erred in sentencing him under both the one strike (§ 667.61) and the habitual sex offender (§ 667.71) laws.

FACTUAL AND PROCEDURAL BACKGROUND

Cortez forcibly raped and orally copulated his half-sister. On the second day of his trial, Cortez brought a *Marsden* motion requesting substitution of his court-appointed public defender. He alleged his attorney was "essentially violating [his] Fifth Amendment rights," "refusing to ask questions relating to evidence," "refusing to obtain evidence and refusing to subpoena witnesses," "leading witnesses constantly," and had "gone so far as to even refuse to allow [his] family to bring clothing so that [Cortez did not] have to wear the same suit at trial." He also accused his attorney of "purposely and prematurely" asking a witness a question and "tipp[ing] the D.A. off" to "allow the witness to change her testimony." When the court asked the attorney to respond, she stated she could not because of the attorney/client privilege, which Cortez then waived. Cortez explained his complaint centered on the timing of a question to a witness regarding his tattoos. The court addressed the clothing issue and Cortez's attorney agreed to have additional shirts forwarded to the sheriff's department for clearance. The court then denied Cortez's *Marsden* motion, explaining "[a]ll of this really comes down to her trial strategy and how she's putting the case on," and that Cortez had an "extremely competent and capable counsel."

² *People v. Marsden* (1970) 2 Cal.3d 118.

After the jury returned guilty verdicts,³ the court sentenced Cortez to 105 years to life⁴ under the habitual sex offender law. The court also imposed but stayed a sentence of 51 years to life⁵ under the one strike law.

DISCUSSION

I

Marsden

"When a defendant seeks to discharge his [or her] appointed counsel and substitute another attorney, asserting inadequate representation, the trial court must permit the defendant to explain the basis of [the] contention and to relate specific instances of the attorney's inadequate performance. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 854, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) "[T]he decision whether to permit a defendant to discharge . . . appointed counsel and substitute another attorney during the trial is within the discretion of the trial

³ The jury found Cortez guilty of forcible rape (§ 261, subd. (a)(2)) and forcible oral copulation (§ 288a, subd. (c)(2)), with a true finding on the allegation he tied or bound the victim (Pen. Code, § 667.61, subds. (a), (c) & (e)(6)). Cortez admitted he had been convicted of a serious or violent felony within the meaning of the three strikes law (§ 667, subds. (b)-(i)), and a serious felony within the meaning of section 667, subdivision (a). The jury was unable to agree on the allegation of use of a dangerous and deadly weapon (Pen. Code, § 667.61, subds. (a), (c) & (e)(4)).

⁴ Twenty-five years to life for the rape and 25 years to life for the oral copulation, both doubled because of the prior strike conviction, plus five years for the prior serious felony conviction.

⁵ Fifteen years to life for the rape and eight years for the oral copulation, both doubled because of the prior strike conviction, plus five years for the prior serious felony conviction.

court" (*People v. Marsden, supra*, 2 Cal.3d at p. 123.) A court abuses its discretion in denying a *Marsden* motion if the record shows the appointed attorney is not providing adequate representation, or defendant and counsel have become embroiled in such an irreconcilable conflict or complete breakdown in the attorney-client relationship that ineffective representation is likely to result. (*People v. Valdez* (2004) 32 Cal.4th 73, 95; *People v. Williams* (1970) 2 Cal.3d 894, 905.) Tactical disagreements do not support a claim of *Marsden* error because "[t]here is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281-282.)

Here, Cortez claims the trial court erred by not conducting an inquiry of defense counsel regarding Cortez's assertions of incompetent representation. The courts of appeal have taken a variety of approaches to the issue of whether the trial court has an affirmative duty, in response to a *Marsden* motion, to question defense counsel about the complained-of actions. (Compare *People v. Groce* (1971) 18 Cal.App.3d 292, 297 [failure to inquire of defense counsel reasons for not introducing certain pieces of evidence was reversible error]; *People v. Munoz* (1974) 41 Cal.App.3d 62, 66 [failure to inquire into defense counsel's "state of mind" was reversible error] with *People v. Huffman* (1977) 71 Cal.App.3d 63, 81 ["[M]aking the kind of inquiry of defense counsel suggested by *Munoz* and *Groce* is simply improper."]; *People v. Penrod* (1980) 112 Cal.App.3d 738, 747 ["Because many actions by a court-appointed attorney are

justifiable, tactical decisions, it is not necessary for the trial judge to engage in a *Munoz* inquiry every time a defendant requests a substitution."].)

In some circumstances, a trial court may have a duty to inquire of defense counsel regarding the defendant's allegations in support of his or her *Marsden* motion. However, no duty arose in the circumstances here. During the *Marsden* hearing, the trial court gave Cortez opportunities to explain his reasons for requesting to replace his attorney by asking, "Anything else you want to tell me?" and, "Anything else you want to put on the record?" and responding, "Yes. Certainly" to Cortez's request to elaborate. In his opening brief, Cortez emphasizes his allegations during the hearing that his attorney was "refusing to obtain evidence and refusing to subpoena witnesses." His primary complaint at the hearing, however, appears to be his attorney's timing in asking the victim if she saw a tattoo on Cortez.⁶ Indeed, Cortez stated in the hearing "she's been incompetent in what she's done to my case, . . . especially, you know, the thing that I brought up [about the tattoo]." We agree with the trial court that Cortez's complaint "comes down to trial strategy." Thus, Cortez's mere disagreement with his attorney's method of cross-examination did not constitute grounds warranting discharge of counsel. Further, Cortez has not shown his disagreement with counsel signaled an irreconcilable conflict or complete breakdown in the attorney-client relationship sufficient to jeopardize his right to effective assistance of counsel.

⁶ Cortez explained that "[i]f the witness has, in fact, seen me naked . . . , she would have noticed this particular piece of evidence."

Cortez cites *People v. Stewart* (1985) 171 Cal.App.3d 388 (disapproved on other grounds by *People v. Smith* (1993) 6 Cal.4th 684, 695) in support of his position that his attorney's refusal to obtain evidence and subpoena witnesses required the trial court to inquire into counsel's efforts to obtain the evidence and witnesses. (*Stewart*, at p. 397.) In *Stewart*, the defendant's central complaint was his attorney's failure to call two witnesses to testify, an issue that "cannot fairly be evaluated by what occurred at trial." (*Ibid.*) Here, despite Cortez's initial statement regarding witnesses and evidence, the crux of his complaint was trial strategy. He did not provide further details regarding the witnesses and evidence despite ample opportunity to do so.

Cortez also quotes language from *Stewart* addressing the purported need of the trial court, in the context of a *Marsden* hearing, to appoint new counsel to "better develop and explain the defendant's assertion of inadequate representation." (*People v. Stewart*, *supra*, 171 Cal.App.3d at p. 396.) The Supreme Court has disapproved this contention. (*People v. Smith*, *supra*, 6 Cal.4th at p. 695 ["The spectacle of a series of attorneys appointed at public expense whose sole job . . . is to claim the previous attorney was . . . incompetent discredits the legal profession and judicial system, often with little benefit in protecting a defendant's legitimate interests."].)

Cortez also relies on *People v. Kelley* (1997) 52 Cal.App.4th 568. *Kelley* is distinguishable because the trial court in that case conducted no inquiry whatsoever in summarily denying the defendant's *Marsden* motion. (*Kelley*, at pp. 579-580.) Here, the trial court conducted a thorough inquiry and provided ample opportunity for Cortez to be heard. The trial court did not abuse its discretion in denying Cortez's motion.

II

Imposition of Sentences Under Both the Habitual Sex Offender and One Strike Laws

"[T]he one strike law and the habitual sexual offender law [are] alternative sentencing schemes: a sentence may be imposed under one of the sentencing schemes, but not both, and the decision to choose which sentencing scheme to impose is within the reasonable discretion of the sentencing court." (*People v. Snow* (2003) 105 Cal.App.4th 271, 282.)

As both parties noted, the divisions in this district are split on the issue of whether a trial court may sentence a defendant under both the habitual sex offender law and the one strike law. (Compare *People v. Snow, supra*, 105 Cal.App.4th at pp. 281-282 with *People v. Lopez* (2004) 119 Cal.App.4th 355, 365-366.) We continue to find the reasoning of *Snow* persuasive. The trial court elected to sentence Cortez under the habitual sexual offender law. Because Cortez cannot also be sentenced under the one strike law, his sentence under the one strike law must be stricken.

DISPOSITION

Cortez's sentence is modified by striking his sentence under the one strike law, and as so modified, affirmed. The judgment is affirmed in all other respects.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.